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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte BHARAT JANI,
MARC DEGADY,
RICHARD M. WARRINGTON,
DEMIAN ARENAS and
EDWARD M. JANOS

Appeal 2008-1114
Application 10/664,426
Technology Center 1700

Decided: February 29, 2008

Before BRADLEY R. GARRIS, THOMAS A. WALTZ, and LINDA M. GAUDETTE, *Administrative Patent Judges*.

WALTZ, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on an appeal under 35 U.S.C. § 134 from the Primary Examiner's final rejection of claims 22-24, which are the only claims pending in this application. We have jurisdiction pursuant to 35 U.S.C. § 6(b).

According to Appellants, the invention is directed to a three-material confection which includes a center layer of a semi-liquid material, an intermediate layer of a gum material, and an outer layer of a hard candy material (App. Br. 2). Independent claim 22 is illustrative of the invention and a copy of this claim is reproduced below:

22. A product having a center layer of a semi-liquid material, an intermediate layer of a gum material and an outer layer of a hard candy material.

The Examiner has relied on the following prior art references as evidence of obviousness:

McDonald	3,062,662	Nov. 6, 1962
Friello	4,250,196	Feb. 10, 1981

ISSUES ON APPEAL

Claims 22-24 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Friello in view of McDonald (Ans. 3).

Appellants contend that there is no motivation to modify or combine the references as proposed by the Examiner (App. Br. 3; Reply Br. 2).

Appellants contend that McDonald's intermixed composition cannot be said to be separate layers as required by the claims (App. Br. 4 and 7; Reply Br. 3).

Appellants contend that, even if the references are combined, one would not expect to achieve success since McDonald does not contemplate the inclusion of center-filled gum or the issue of leakage, and adding the hot candy material as taught by McDonald to the product of Friello would be likely to destroy the water-impermeability and result in leakage of the gum base material of Friello (App. Br. 6-7; Reply Br. 4-5).

The Examiner contends that it was well known in the art to coat gum with hard candy for the benefit of attractiveness (Ans. 3-4). The Examiner also contends that McDonald clearly discloses that the bubble gum is disposed in the center of the "candy coating" (Ans. 4).

Accordingly, we determine from the record that the issues on appeal are as follows: (1) Have Appellants established that the Examiner reversibly erred in combining the references as proposed?; and (2) Have Appellants established that, even if the references are combined, one of ordinary skill in this art would not expect to achieve success?

We determine that the Examiner has established a prima facie case of obviousness based on the record as a whole, which prima facie case has not been adequately rebutted by Appellants' arguments. Therefore, we AFFIRM the sole ground of rejection presented for review in this appeal essentially for the reasons stated in the Answer, as well as those reasons set forth below.

OPINION

We determine the following Factual Findings (FF) from the record in this appeal:

(1) Friello discloses a center-filled chewing gum where the center fill is an aqueous solution containing hydrogenated starch hydrolysate, the chewing gum includes a water-insoluble, water-impermeable gum base, and the product has an extended shelf life with good liquid integrity after four months (Abstract; col. 1, ll. 29-41; col. 4, ll. 52-56; col. 5, ll. 15-19; and col. 9, ll. 24-28);

(2) McDonald discloses a combination of bubble gum and candy, where the gum is intermixed and enclosed by a coating of edible candy, thus incorporating a combination of two attractive ingredients in an attractive form since it is known that children prefer confections in the form of suckers or lollipops (col. 1, ll. 7-8 and 19-32);

(3) McDonald teaches that the novel confection is produced by a process that intermixes the candy composition with a portion of the bubble gum material to alter the taste and feel of the product by dipping the gum into hot candy syrup, where the temperature of the candy syrup is sufficient so that dipping of the gum into the syrup will partially melt and soften and mix the bubble gum with the candy (col. 1, ll. 33-46; col. 2, ll. 6-23 and 51-54); and

(4) Appellants admit that two-phase confections were known in the art, including a hard candy shell surrounding bubble gum or softer fillings and a bubble gum having an outer shell with a soft or syrup-like center filling (Specification 1, ¶¶ [0003] and [0004]).[1]

Under 35 U.S.C. § 103, the factual inquiry into obviousness requires a determination of: (1) the scope and content of the prior art; (2) the differences between the claimed subject matter and the prior art; (3) the level of ordinary skill in the art; and (4) secondary considerations, if any. *See*

[1] It is axiomatic that admitted prior art in an applicant's specification may be used in determining the patentability of a claimed invention (*In re Nomiya,* 509 F.2d 566, 570-71 (CCPA 1975)); and that consideration of the prior art cited by the Examiner may include consideration of the admitted prior art found in an applicant's specification (*In re Davis,* 305 F.2d 501, 503 (CCPA 1962); *cf., In re Hedges,* 783 F.2d 1038, 1039-40 (Fed. Cir. 1986)).

Graham v. John Deere Co. of Kansas City, 383 U.S. 1, 17-18 (1966). As stated by the Supreme Court in *KSR Int'l Co. v. Teleflex, Inc.,* 127 S. Ct. 1727, 1740-41 (2007):

> Often, it will be necessary for a court to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements in the fashion claimed by the patent at issue.
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> ...
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> As our precedents make clear, however, the analysis need not seek out precise teachings directed to the specific subject matter of the challenged claim, for a court can take account of the inferences and creative steps that a person of ordinary skill in the art would employ.

Applying the preceding legal principles to the Factual Findings in the record of this appeal, we determine that the preponderance of the evidence weighs in favor of obviousness within the meaning of § 103(a). As shown by FF (1) and (2) listed above, and admitted by Appellants (FF (4) listed above), we determine that all elements of claim 22 on appeal were known in the art, namely a hard candy shell enclosing a gum material and a gum material enclosing a liquid-filled center. As shown by FF (2) listed above, we determine that one of ordinary skill in this art would have known to use a hard candy shell around a soft confection for its taste and attractiveness. As shown by FF (3) and (4) listed above, we determine that one of ordinary skill in this art would have known the dipping process and temperatures required to either produce a hard candy shell surrounding a softer center such as gum

(such as a "Blow Pop"; Spec. 1, ¶ [0003]) or a hard candy shell intermixing some portion with a gum center (McDonald), and thus one of ordinary skill in this art would have known or been able to determine the parameters to produce a hard candy shell surrounding a gum with a liquid center. Likewise, we determine that one of ordinary skill in this art would have been aware of leakage and absorption problems when coating a gum with a liquid center (Reply Br. 5; Friello, col. 9, ll. 24-28; *see* FF (1) listed above). Accordingly, we determine that one of ordinary skill in this art would have used the appropriate temperature to ensure dipping of a liquid-filled gum into the candy syrup without leakage of the fill material.

With regard to Appellants' contention that McDonald's intermixed compositions cannot be said to be separate layers as required by the claims (App. Br. 4 and 7; Reply Br. 3), we do not find such an argument persuasive. We note that the claims on appeal do not require "separate and distinct" layers as argued by Appellants. *See In re Bigio,* 381 F.3d 1320, 1325 (Fed. Cir. 2004) (The PTO should only limit the claim based on an express disclaimer of a broader definition). We also determine that McDonald is not limited to the entirety of the candy and gum layers intermixing but specifically teaches that only a "portion" or a "substantial part" of the bubble gum layer intermixes with the candy composition (McDonald, col. 1, ll. 9-12 and 33-36). Therefore, we determine that portions of each ingredient remain as separate and distinct layers.

For the foregoing reasons and those stated in the Answer, we affirm the rejection presented in this appeal. The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

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